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88-7351

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY ALAN WALTON

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law?

2. Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?

3) Whether Arizona's "especially heinous, cruel or depraved" aggravating circumstance, as interpreted and applied by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW . 7

REASONS FOR GRANTING THE WRIT 8

I. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violates the Sixth Amendment by removing the jury from the determination of factual elements of capital murder 8

II. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering all relevant mitigating circumstances and presuming death to be the appropriate sentence 11

III. The decision of the court below is irreconcilable with this Court's decision in Maynard v. Cartwright and the Ninth Circuit's decision in Adamson v. Ricketts . . . 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases	Page
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)	passim
Blystone v. Pennsylvania, cert. granted, ___ U.S. ___, No. 88-6222 (1989)	13
Bushell's Case, 6 Howard State Trial 999 (1670)	10
California v.Ramos, 463 U.S. 992 (1983)	8
Eddings v. Oklahoma, 455 U.S. 104 (1982)	11
Fitzpatrick v. State, 638 P.2d 1002 (Mont. 1981)	11
Godfrey v. Georgia, 446 U.S. 420 (1980)	14
Harper v. Grammer, 654 F.Supp. 515 (D.Neb. 1987)	11
Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988)	12
Lockett v. Ohio, 438 U.S. 586 (1978)	11
Maynard v. Cartwright, 108 S.Ct. 1853 (1988)	13, 16
Maxwell v. Dow, 176 U.S. 581	10
McMillan v. Pennsylvania, 477 U.S. 79 (1986)	10
Morrissette v. United States, 342 U.S. 246 (1952)	9
Roberts v. Louisiana, 428 U.S. 325 (1976)	12
Spaziano v. Florida, 468 U.S. 447 (1984)	8
State v. Brookover, 601 P.2d 1322 (Ariz. 1979)	15
State v. Cookus, 563 P.2d 898 (Ariz. 1977)	15
State v. Creech, 670 P.2d 463 (Id. 1983), cert. denied, 465 U.S. 1051 (1984)	11
State v. Graham, 660 P.2d 460 (Ariz. 1983)	16
State v. Gretzler, 659 P.2d (Ariz.), cert. denied, 461 U.S. 971 (1983)	9, 13, 14
State v. Jordan, 614 P2.d 825 (Ariz. 1980).	9
State v. Madsden, 609 P.2d 1046, cert. denied, 449 U.S. 873 (1980)	9, 16
State v. McMurtrey, 691 P.2d 1099 (Ariz. 1984).	11
State v. Nash, 694 P.2d 222 (Ariz. 1985), cert. denied 471 U.S. 1143 (1985)	15
State v. Ortiz, 639 P.2d 1020 (Ariz. 1981), cert. denied, 456 U.S. 984 (1982)	14
State v. Quinn, 623 P.2d 644 (Ore. 1981)	11
State v. Zaragoza, 639 P.2d 22 (Ariz.), cert. denied, 468 U.S. 1124 (1983)	13
United States v. Battiste, 2 Sumner 240 (1835)	10
Woodson v. North Carolina, 428 U.S. 280 (1976)	12

Woratzeck v. Ricketts, 108 S.Ct. 2815 (1988)	14
Zant v. Stephens, 462 U.S. 872, 878-79 (1983)	8

Constitutional Provisions

U.S. Const. Amend. VI	passim
U.S. Const. Amend VIII	passim
U.S. Const. Amend. XIV	passim

Statutory Provisions

A.R.S. 13-703	passim

Other Authorities

4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed.1900)	10
Forsyth, History of Trial by Jury (1852)	10
Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv.L.Rev. 669 (1918)	10
THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 185 (1898)	10

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IN THE

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JEFFREY ALAN WALTON

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Jeffrey Alan Walton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered on February 2, 1989.

OPINION BELOW

The opinion of the Arizona Supreme Court is not yet officially reported but is attached as Appendix "A" to this petition.

JURISDICTION

The judgment of the Supreme Court of Arizona affirming Petitioner's conviction and sentence was entered on February 2, 1989. A timely motion for reconsideration was filed and is attached as Appendix "B" to this petition. The Order of the Arizona Supreme Court denying Petitioner's motion for reconsideration was entered on March 21, 1989 and is attached

reconsideration was entered on March 21, 1989 and is attached as Appendix "C" to this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> U.S. Const. amend. VI: In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . .
>
> U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. Const. amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .
>
> A.R.S. Section 13-703:
>
> Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances
>
> A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.
>
> B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the

existence or non-existence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such materials as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or non-existence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or non-existence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection

G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peach officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provision of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

STATEMENT OF THE CASE

On December 16, 1986, Petitioner was found guilty of first degree murder, armed robbery, kidnapping and theft by control. At trial, the state presented evidence that on March

2, 1986, Petitioner, Robert Hoover and Hoover's girlfriend, Sharold Ramsey, robbed the victim in a bar parking lot and then drove the victim in the victim's car to a secluded area. According to a statement given by Ramsey[1], Petitioner killed the victim. Petitioner denied any part in the killing; he stated that Hoover killed the victim. There was no physical evidence to show who killed the victim.

The jury was instructed on premeditated and felony murder - both of which constitute first degree murder under Arizona law. See Appendix "D". The guilty verdict returned by the jury did not specify whether the jury found Petitioner guilty of premeditated or felony murder. See Appendix "E".

At the penalty trial, the state argued that the evidence supported two statutory aggravating circumstances: that Petitioner committed the murder for pecuniary gain and that he committed the murder in an especially heinous, cruel or depraved manner.

At the outset of the penalty trial, Petitioner proffered testimony from the foreman of the jury that convicted him. The jury foreman would have testified that the jury could not decide whether Petitioner killed the victim and for that reason, the jury convicted Petitioner based on the felony murder rule alone[2]. The trial court refused to admit that testimony. See Appendix "F".

Petitioner presented mitigation evidence through expert

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[1]In exchange for testifying against Walton, Ramsey pleaded guilty to second degree murder.

[2]The jury foreman's testimony is further supported by the following question the jury sent to the judge during its deliberations:

> If a person is present during the commission of felony murder, but does not "pull the trigger," is that person guilty of felony murder?

psychiatric testimony that he suffered from a physically and emotionally abused childhood, that he was mentally impaired due to chronic drug abuse, that he had a passive dependent personality and was a follower, not a leader, and that he did not have a violent nature. Petitioner further argued that his youth, age 20 at the time of the crime, was relevant mitigation.

Notwithstanding the jury foreman's proffered testimony, the trial court found that Petitioner killed the victim and did so for pecuniary gain and in an "especially heinous, cruel or depraved manner"[3]. The court found no mitigating circumstances "sufficiently substantial to call for leniency," and sentenced Petitioner to death. See Appendix "G".

HOW THE FEDERAL QUESTIONS
WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. All the issues concerning the unconstitutionality of Arizona's death penalty statute were presented to the Arizona Supreme Court in Petitioner's appellate briefs challenging his conviction and death sentence. In a written opinion, the Arizona court rejected those federal constitutional claims and affirmed the conviction and death sentence. See Appendix "A", p.20-21. Petitioner moved for reconsideration, specifically arguing that the court's decision was in conflict with the Ninth Circuit's holding in Adamson v. Ricketts, 865 F2.d 1011 (1988), which found Arizona's death penalty statute

[3]In finding the "especially heinous, cruel or depraved" aggravating circumstance, the trial court gave no explanation as to what it believed those terms meant or what facts it relied on to make this finding.

unconstitutional on the very issues Petitioner raised. See Appendix "B". The court denied the motion. See Appendix "C".

REASONS FOR GRANTING THE WRIT

This case presents extraordinary circumstances. The decision below affirming Petitioner's death sentence directly conflicts with the Ninth Circuit's decision in Adamson v. Ricketts which held Arizona's death penalty statute unconstitutional on all three issues raised here. Because of these extraordinary circumstances, this Court's review is warranted. Sup.Ct.R. 17.1(a).

I. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violates the Sixth Amendment by removing the jury from the determination of factual elements of capital murder.

Under Arizona's death penalty statute, the trial judge must make two decisions at the penalty trial: 1) a factual determination whether the elements necessary to impose death exist by competent evidence beyond a reasonable doubt and 2) a determination as to the appropriate punishment to be imposed. It is only the second decision that this court said may be made by a judge. Spaziano v. Florida, 468 U.S. 447 (1984).

The first decision, whether the factual elements which make a defendant eligible for death exist, is fundamentally different from the sentencing decision. California v. Ramos, 463 U.S. 992, 1007-08 (1983); Zant v. Stephens, 462 U.S. 872, 878-79 (1983). It is a decision that requires the finding of facts - set forth as "aggravating circumstances" in Arizona's statute - which are no different than the elements of an offense found by the jury at the guilt/innocence trial. It is a decision that requires proof beyond a reasonable doubt

by admissible evidence of the elements necessary to find a defendant guilty of capital murder. A.R.S. §13-703 (C); State v. Jordan, 614 P.2d 825, 828 (Ariz.), cert. denied, 449 U.S. 986 (1980).

It is also a decision that requires the fact-finder here to inquire into the defendant's actions and state of mind at the time of the crime: whether "the defendant committed the offense" for pecuniary gain, A.R.S. Section 13-703(F)(5), or in an "especially heinous, cruel or depraved manner," A.R.S. Section 13-703(F)(6). State v. Gretzler, 659 P.2d 1, 10 (Ariz.), cert. denied, 461 U.S. 971 (1983) (court must determine defendant's "state of mind at the time of murder as evidenced by [his] . . . actions"); State v. Madsen, 609 P.2d 1046, 1053 (Ariz.), cert. denied, 449 U.S. 873 (1980) ("To comply with the statute, the receipt of the [property] must be the cause of the murder . . ."). Yet this inquiry has always been the sole province of the jury. Morrissette v. United States, 342 U.S. 246, 274 (1952) ("Where the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury.").

Here, the trial judge made these factual findings despite testimony that the fact-finder guaranteed Petitioner under the Sixth and Fourteenth Amendments -- the jury -- could not decide whether Petitioner killed the victim. The denial of a jury trial could not have greater consequences.

The determination of aggravating circumstances is also a decision that subjects a defendant to a greater and irrevocable punishment: death. When a statute requires a factual finding that not only enhances the maximum punishment but subjects a defendant to a separate and additional punishment, the Sixth Amendment requires that the defendant

be afforded a right to a jury trial. See McMillan v. Pennsylvania, 477 U.S. 79 (1986) (finding unconstitutional a preponderance standard of proof in Pennsylvania statute which increased the minimum sentence, within a determined sentencing range, for a felony conviction involving visible use of a gun because the finding "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty"). By removing the jury from the determination of the factual elements of capital murder, Arizona has violated the principle basic to Anglo-American jurisprudence: ". . . that the jury should respond as to the facts and the court as to the law." United States v. Battiste, 2 Sumner 240, 243 (1835).[4]

In Adamson v. Ricketts, 865 F.2d 1011, 1029 (1988), the Ninth Circuit agreed that the factual determination of aggravating circumstances in Arizona's statute cannot be made by a judge:

> We hold that Arizona has impermissibly identified elements of the crime of capital murder as sentencing factors for determination by a judge, thereby removing their consideration from a jury, in violation of the Sixth Amendment.

[4] Lord Coke's Latin phrasing was the accepted rule by the Seventeenth Century: "Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores." Forsyth, History of Trial by Jury, 259 (1852); see Bushell's Case, 6 Howard State Trial 999, Vaughn's Rep. 135, 149 (1670). Translated into English, it has been called "the fundamental maxim acknowledged by the Constitution." Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv.L.Rev. 669, 679 (1918). Accord, Maxwell v. Dow, 176 U.S. 581, 609 (dissenting opinion of Mr. Justice Harlan); 4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed.1900); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 185 (1898). "The distinction between the province of the judge and that of the jury is . . . clearly defined, and observed with jealous accuracy . . . [the jury has] the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere . . ." Forsythe, History of Trial by Jury at 282.

Because the decision below conflicts with the Ninth Circuit's decision in Adamson and other lower courts are divided[5] on this issue, this Court should grant review and decide this issue.

II. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering all relevant mitigating circumstances and presuming death to be the appropriate sentence.

Under Arizona's death penalty statute, once the state presents evidence to establish aggravating circumstances beyond a reasonable doubt, the defendant has the burden to establish by a preponderance of the evidence the existence of mitigating circumstances. State v. McMurtrey, 691 P.2d 1099 (Ariz. 1984), appeal after remand, 726 P.2d 202 (1986), cert. denied 107 S. Ct. 1359 (1987). If the mitigating evidence does not meet the preponderance standard, it cannot be considered in determining the appropriateness of the death penalty. The exclusion of relevant mitigation evidence violates the Eighth and Fourteenth Amendments and enhances " . . . the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Eddings v. Oklahoma, 455 U.S. 104 (1982) ("Just as the State may not by statute preclude the sentencer from considering, any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . ."). See

[5]See Harper v. Grammer, 654 F.Supp.515 (D.Neb.1987); State v. Creech, 670P.2d 463 (Id. 1983), cert denied, 465 U.S. 1051 (1984); Fitzpatrick v. State, 638 P.2d 1002, 1012 (Mont. 1981). Contra State v. Quinn, 623 P.2d 644 (Ore.1981); State v. Creech, 670 P.2d at 467-505 (dissenting opinion); Fitzpatrick v. State, 638 P.2d at 1041 (dissenting opinion).

also Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976).

For this reason, in Adamson v. Ricketts, 865 F.2d at 1041, the Ninth Circuit held Arizona's death penalty statute unconstitutional as a matter of law:

> [T]he Arizona courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. This exclusion of relevant evidence at the weighing stage violates the principle established by Woodson, Roberts, Lockett, Eddings, and reaffirmed in Turner that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances.

The Ninth Circuit also held that Arizona's death penalty statute violates the Eighth and Fourteenth Amendments because it imposes a presumption of death by requiring the defendant to bear the burden of proving mitigating circumstances sufficiently substantial to call for leniency. If the defendant does not carry that burden, death must be imposed. As the Ninth Circuit recognized, that scheme:

> . . . precludes the individualized sentencing required by the Constitution [and] . . . removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances.

Adamson, 865 F.2d at 1042 (emphasis in original).

The Eleventh Circuit's recent decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert denied 108 S.Ct. 2005 (1988) is in accord. There, the Eleventh Circuit held unconstitutional a jury instruction that death is presumed to be the proper sentence if the aggravating circumstances were

not outweighed by the mitigating circumstances. The Eleventh Circuit found that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." 837 F.2d at 1473.

In addition, the Arizona statute is mandatory: it does not permit the sentencer to decide if the death penalty is the appropriate punishment in an individual case. Where aggravating circumstances are found and no mitigating circumstances sufficiently substantial to call for leniency are found, the trial court must impose death. State v. Zaragoza, 659 P.2d 22, 28 (Ariz.), cert. denied, 462 U.S. 1124 (1983); State v. Gretzler, 659 P.2d at 13.

Because of this last feature, this case presents the same burden of proof issue on which this Court granted review in Blystone v. Pennsylvania, No. 88-6222. But it also presents more: two other, closely related issues on which there is a direct conflict between the court below and the Court of Appeals. Because Blystone cannot resolve all aspects of this conflict, review should be granted here to settle the law.

III. The decision of the court below is irreconcilable with this Court's decision in Maynard v. Cartwright and the Ninth Circuit's decision in Adamson v. Ricketts.

Petitioner was sentenced to death after the trial court found, and the Arizona Supreme Court agreed, that Petitioner "committed the offense in an especially heinous, cruel, or depraved manner." A.R.S. Section 13-703(F)(6). This statutory aggravating is almost identical to that found unconstitutional by this Court in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Like the Oklahoma court in Maynard, the Arizona Court has read this statute in the disjunctive, permitting death sentences to be imposed if the murder can be

described in any of its vague terms. State v. Gretzler, 659 P.2d at 10; see Godfrey v. Georgia, 446 U.S. 420, 454 (White, J. dissenting).

Also, like the Oklahoma court in Maynard, the Arizona court has defined this aggravating circumstance in hopelessly vague terms:

> We have objectively defined the relevant terms: a murder is "heinous" if "hatefully or shockingly evil;" "cruel" if "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" and "depraved" if "marked by debasement, corruption, perversion or deterioration. ". . . Cruelty focuses on the sensations of the victim before death, depravity focuses on the murderer's state of mind, and heinousness focuses on society's view of the murder as compared to other murders. To use this aggravating circumstance, the trial court must find that the murder is especially heinous, cruel or depraved.

State v. Ortiz, 639 P.2d 1020, 1031 (Ariz.1981), cert. denied, 456 U.S. 984 (1982) (emphasis in original, citations omitted); see Adamson v. Ricketts, 865 F.2d at 1030-1036.

This Court apparently recognized the remarkable similarity in the two statutes when it remanded another Arizona case, Woratzeck v. Ricketts, 108 S.Ct. 2815 (1988), to the Court of Appeals in light of Maynard. The Arizona court's application of the aggravating circumstance there is the same as its application here.

In Adamson v. Ricketts, the Ninth Circuit also found no distinction between the offending aggravating circumstance in Maynard and that in Arizona's death penalty statute when it held Arizona's "heinous, cruel or depraved" aggravating circumstance unconstitutional:

> Arizona has been unable to provide clearly discernable parameters to establish what kind of conduct falls within the (F)(6) circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given

> the complete lack of any objective standards that guide the court in its decision making, and its unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Adamson, 865 F.2d at 1036-37.

> The (F)(6) circumstance had been applied in an arbitrary and capricious manner in violation of the most basic principles of death penalty jurisprudence.

Adamson, 865 F.2d at 1038.

The arbitrary and contradictory application of this aggravating circumstance is well illustrated here. The Arizona Court affirmed the trial court's finding that Petitioner committed the offense in a cruel manner because the victim "suffered great mental anguish" when his "fate was uncertain." Appendix A, p. 26. Yet the court did not find cruelty in State v. Cookus, 563 P.2d 898 (1977), where the defendant robbed the victim, took him to a remote area, beat him with a gun and rocks, shot at him six times (each time the gun misfiring), and finally after discussing the matter with his accomplice, switched guns and killed the victim. Nor did the court find cruelty in State v. Brookover, 601 P.2d 1322, 1324-25 (Ariz. 1979), where the defendant shot the victim in the back, and when the victim cried out for help, shot him again. And the court did not find it cruel in State v. Nash, 694 P.2d 222 (Ariz.), cert denied, 471 U.S. 1143 (1985), where the victim, shot during a robbery, pled for mercy before the defendant shot him twice more.

This same inconsistency and contradiction is found in the Arizona Supreme Court's finding that Petitioner committed the murder in a depraved manner because after the killing, Petitioner stated that he had "never seen a man pee in his pants before." Based on that statement alone, the Arizona

court affirmed the finding of depravity, noting:

> The statement shows an indifference to the suffering of the victim and evidences a sense of pleasure which the defendant took in the killing.
>
> Appendix A, p. 27.

The statement shows no such thing; it is a neutral statement of a fact. It is not like the statement in State v. Graham, 660 P.2d 460, 463 (Ariz. 1983), where the defendant smiled when he told others that the victim "squealed like a rabbit when he was shot, or State v. Madsden, 609 P.2d 1046 (Ariz.), cert. denied, 449 U.S. 873 (1980), where the defendant bragged how "easy" it was to kill someone for insurance money. But depravity was not found in either case.

As this case demonstrates, and the Ninth Circuit agreed, the Arizona courts' willingness to find the "heinous, cruel or depraved" aggravating circumstance on any facts presented to it violates basic Eighth Amendment principles. Adamson, 865 F.2d at 1036. Because the Arizona courts continue to refuse to follow the principles set forth in Maynard v. Cartwright, review should be granted on this issue as well.

CONCLUSION

The decision below affirming Petitioner's death sentence directly conflicts with the Ninth Circuit's decision in Adamson v. Ricketts which held Arizona's death penalty statute unconstitutional on all three issues raised here. The writ of certiorari should, therefore, be granted. Sup.Ct.R. 17.1(a)

Respectfully submitted,

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May 20, 1989.

APPENDICES

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, vs. JEFFREY ALAN WALTON, Appellant.	)	Supreme Court No. CR-87-0022-AP Pima County Superior Court No. CR-17537

Appeal from the Superior Court of Pima County

The Honorable Thomas Meehan, Judge

AFFIRMED

Robert K. Corbin, Attorney General — Phoenix
By: William J. Schafer III
Paul J. McMurdie
Assistants Attorney General
Attorneys for Appellee

Harold L. Higgins, Jr., Pima County Public Defender — Tucson
Attorneys for Appellant

HOLOHAN, Justice (Retired)

The defendant, Jeffrey Walton, was convicted of first degree murder, armed robbery, kidnapping, and theft by control for abducting, robbing and killing Thomas Powell. He was sentenced to death on the murder conviction and to prison terms on the noncapital felony convictions, to be served consecutively to the death sentence.

The facts developed at trial are that the defendant and his two codefendants, Robert Hoover and Sharold Ramsey, had planned to rob at gunpoint some "old man that was drunk," take his car, tie him up, and leave him in the desert area outside of Tucson while they fled from the

state in his vehicle. Instead, they encountered a young marine, Thomas Powell, in a bar parking lot. They took his wallet and keys and forced him into his car with them. They then proceeded out of the city on Speedway Boulevard to Gates Pass where they pulled off the road in a secluded spot. Having no materials suitable for tying up Powell, they forced him to lie face down on the ground while they debated his fate. Ultimately, the defendant took the gun and marched Powell into the darkness, leaving the other two in the car. The defendant instructed the codefendants to "turn up the radio." After a short walk, the defendant again forced Powell to lie prone on the ground; he shot the victim once in the head and hurried back to the vehicle.

The victim had been rendered unconscious and blind by the shot, but he eventually regained consciousness. Weakened and hampered by his blindness, he floundered in the desert. Approximately a week after the shooting, the victim died from exposure and pneumonia.

Soon after the killing, the defendant asked David Bilodeau for dynamite to destroy the victim's car, explaining that he had killed someone and needed to dispose of evidence. Mr. Bilodeau promptly related this information to police who eventually arrested the trio. The defendant gave the police a statement and led them to the murder area where they found Powell's body less than a day after he had succumbed.

We have jurisdiction pursuant to art. 6, § 5(3) of the Arizona Constitution and A.R.S. § 12-102 and § 13-4031. We affirm the conviction of guilt and sentences on all counts.

The defendant presents twenty-seven issues for our review. For the sake of brevity, we consolidate those into the following issues:

I. Rule 11: Whether the defendant should have had greater opportunity to develop evidence of incompetence despite a pre-Rule 11 screening indicating no incompetence.

II. Election of Murder Theories: Whether the state should have elected between premeditated and felony murder theories.

III. Voluntariness of Statement: Whether the defendant had voluntarily rendered his statement to the police.

IV. Voir Dire: Whether the jury had been impermissibly tainted by pretrial publicity and the judge's comment at voir dire.

V. Evidence: Whether the judge erred in evidence admissibility rulings.

VI. Jury Instructions: Whether the judge erred in instructing the jury.

VII. Death Sentence: Whether the Arizona death penalty is unconstitutional, and it was properly applied by the trial court when sentencing the defendant to death.

VIII. Prison Term Sentences: Whether the trial court erred in imposing prison terms on the noncapital offenses consecutive to the death sentence, and whether the trial court erred in considering the impact of those offenses on the victim's family to aggravate the prison sentences.

IX. Ineffective Assistance of Counsel: Whether the defendant's attorney provided ineffective assistance.

I. RULE 11

The defendant first contends that the trial court erred when it denied his request for a Rule 11 competency evaluation and continuances to develop evidence of incompetency and insanity.

A. Rule 11 Evaluation

Rule 11.1, Arizona Rules of Criminal Procedure, provides that the state shall not try anyone who is "unable to understand the proceedings against him or to assist in his own defense." If a defendant appears incompetent, any party may request a competency examination. 17 A.R.S., Rules of Crim. Proc., Rule 11.2. Pursuant to Rule 11.3, if the trial court determines that reasonable grounds exist for an examination, mental health experts are appointed to examine the defendant. Prior to making the determination whether reasonable grounds exist, the trial judge may order a preliminary evaluation of the defendant. State v. Johnson, 147 Ariz. 395, 398-99, 710 P.2d 1050, 1053 (1985).

In the present case, the court ordered a preliminary evaluation of the defendant by Dr. Hinton, a psychologist with the Pima County Court Clinic. Dr. Hinton reported that the defendant displayed no signs of incompetence nor insanity. The trial court therefore concluded that there was no reasonable grounds for a Rule 11 examination. Under similar circumstances, we have held that the report of the psychologist was "more than sufficient ... to base a conclusion that defendant could assist in the preparation of his defense," hence the trial court did not abuse its discretion when it denied the motion for a Rule 11 examination. State v. Borbon, 146 Ariz. 392, 395, 706 P.2d 718, 721.

After the denial of the motion for mental examination, the defendant made several additional requests for a Rule 11 examination. However, the only showing made by the defense was the existence of a childhood history of psychiatric referrals and some blackouts caused by substance abuse. The trial court ruled, and we agree, that these matters were not relevant to show present incompetence to stand trial. Nonetheless, the

defendant persistently argued that the trial court should treat amnesia and a history of substance abuse as evidence of incompetence. The trial court declined to accept the defense's theory. We find no abuse of discretion in the trial court's rulings.

In addition, the defendant also wanted a Rule 11 evaluation to provide him with evidence bearing on his insanity at the time of the offense. However, he never gave notice, as required by Rule 15.2(b), Ariz. R. Crim. P., that he would allege an insanity defense, nor did a subsequent mental examination conducted prior to sentencing disclose any basis for an insanity defense. The defense was not entitled to expert assistance on a defense he had no intention or basis to use. Therefore, we hold that the trial judge did not err by refusing to grant a Rule 11 examination.

B. Continuances

On several occasions, the defendant sought continuances to develop evidence of incompetence or insanity related to his history of substance abuse and speculated mental illness. The court granted the defense counsel's first motion for continuance to allow him additional time for trial preparation. The trial court also ordered a preliminary mental evaluation of the defendant. After the examination and report by Dr. Hinton, subsequent motions for continuances to develop evidence of insanity were denied.

As noted above, the defendant is not entitled to continuances to gather evidence of insanity when he has not sought an insanity defense. Moreover, because the evidence he hoped to develop during continuances (memory impairment) is immaterial to his present competency and guilt, People v. Amador, 200 Cal. App.3d 1449, 246 Cal. Rptr. 605 (1988), the

The defendant finally contends that he was not afforded effective assistance of counsel. He advances four challenges to his counsel's assistance, and we raise an additional concern. We address our concern first.

After the trial judge imposed the sentence in this case he asked counsel if he wanted to represent the defendant on appeal. Counsel replied, "I don't think that's best now, considering some of the issues." Though counsel did not specify those issues, it is reasonable to assume from counsel's comment that an ineffective assistance of counsel claim would be an issue. The trial judge nevertheless appointed him to continue representing the defendant on appeal.

We believe that the trial judge should have inquired further into the matter before ordering counsel to continue to represent his client on appeal. It is important that appellate counsel be free to advance or reject the issue of effectiveness of trial counsel. We recognize that a defendant, after conviction, is often dissatisfied with the performance of his trial counsel. However, generalized dissatisfaction, without alleging a basis for an ineffective assistance claim, does not suffice to disqualify counsel on appeal. Despite the foregoing, when defense counsel advises the trial court that ineffective assistance of counsel may be an issue on appeal, the better practice is that the trial court should appoint different counsel to represent the defendant on appeal.

Following the trial judge's orders to represent the defendant, counsel directs our attention to four instances in which he alleges he acted ineffectively: (1) he focused his arguments on the distinction between "not guilty" and "innocent" instead of attacking weaknesses in the state's case; (2) he failed to raise at the suppression hearing the

detective's promises to the defendant; (3) he failed to timely file a request for a Rule 11 examination; and (4) he stipulated to crucial facts rather than presenting witnesses at trial.

The Supreme Court set forth the standard for courts to apply in evaluating ineffective assistance of counsel claims. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Id. For that, he must specify acts and omissions of counsel that allegedly constituted ineffective assistance. State v. Santanna, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). Second, the defendant must show that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. To show that, the defendant must be able to demonstrate a "reasonable probability" that the verdict might have been affected by the error. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; State v. Schossow, 145 Ariz. 504, 508, 703 P.2d 448, 452 (1985); State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, we must evaluate counsel's performance prospectively. Id. Thus, the defendant bears a heavy burden to overcome the presumption that counsel's action "might be considered sound trial strategy" at the time. Id. (citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

We preliminarily note that defense counsel in the present matter

stretches the bounds of credibility when he claims that he should have argued that his client was innocent. Counsel had to realize from overwhelming evidence of involvement in the crime that his client was not innocent. In addition, the defendant's claim fails to overcome the presumption that his counsel made a sound tactical decision. See id. Moreover, the second and third claims are rendered moot by our holdings that the detective's statement did not constitute a promise and the defendant was not entitled to a Rule 11 evaluation. See supra, Sections III, I(A). We turn to the fourth allegation.

The defendant's fourth claim, that counsel should not have stipulated to certain facts, may evidence defects in counsel's assistance, but it fails to meet the second prong of the Strickland test, i.e., that the deficiencies prejudiced the defendant. The defendant offers no more than speculation concerning prejudice: the alleged errors "potentially [had] great impact on the ultimate outcome." To show sufficient prejudice, the defendant must point to actual bias he suffered. State v. Richmond (Richmond II), 136 Ariz. 312, 317, 666 P.2d 57, 62, cert. denied, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Mere speculation of prejudice will not suffice. Santanna, 153 Ariz. at 150, 735 P.2d at 760. Although counsel's performance was at times deficient, we find that it did not prejudice the defendant. We hold, therefore, that defense counsel's conduct did not deprive the defendant of his right to effective assistance.

In conclusion, we have examined the entire record for fundamental error as required by A.R.S. § 13-4035, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), and find none. We affirm the convictions and

sentences.

WILLIAM A. HOLOHAN, Justice (Retired)

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES DUKE CAMERON, Justice

FELDMAN, Vice Chief Justice, concurring

There is no doubt that Walton was a participant in the kidnapping and robbery that eventually led to the victim's murder. Hence, there is no doubt that Walton is guilty of (felony) first degree murder. At the outset, the only issue of consequence in this case was whether Walton's punishment should be life imprisonment or death. The death penalty could be imposed only if Walton was the actual killer or acted, at the least, with reckless indifference to human life. Tison v. Arizona, ___ U.S. ____, 107 S.Ct. 1678 (1987); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982).

Following the aggravation/mitigation hearing, the trial judge sentenced Walton to death, finding that he had fired the fatal shot. This finding is the issue on appeal. Walton denies firing the shot. In his confession to the police, he accuses Hoover of the actual killing. Hoover, of course, accuses Walton. This is the so-called "mirror image accusation" -- each of two very culpable defendants points the finger at the other, seeking some measure of leniency for himself. Hoover's girlfriend, given a very generous plea bargain, unsurprisingly supports Hoover. A witness, Bilodeau, relating one of Walton's admissions, supported Walton in his statement to the police, but more or less supported Hoover in his trial testimony. It is fair to say that given their records, their characters, and the circumstances in which each of these individuals found him or herself, not one of them is especially worthy of belief.

Nor does the physical evidence help us decide who actually shot the victim. Walton owned the murder weapon, but the police found it and the victim's car in Hoover's possession when they apprehended Hoover and his girlfriend in California sometime after the crime in question.

Evidently the jury also found the question of who actually shot the victim difficult. From the question they asked the court, let alone the statement contained in the foreman's affidavit offered at the mitigation hearing, it is obvious that the jury was unable to decide whether Walton was the actual killer. Under the facts of this case, if Walton was the killer, he was certainly guilty of premeditated murder, but it appears the jury was unable to agree on such a finding.

Thus, this case illustrates a serious problem. The majority quite correctly holds that the United States Supreme Court has instructed us that Enmund findings relate only to eighth amendment issues, may be made at any stage of the proceedings, and not necessarily by the jury. Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689 (1986). Moreover, the Court has not required us to adopt any particular procedure and has left each state free to adopt its own procedure in making the Enmund findings. Id. at ____, 106 S.Ct. at 697.

Exercising the discretion later granted us in Cabana, in State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), we held that because there is only one crime of first degree murder, and "where the jury might have found the defendant guilty of [either] first degree murder based on a felony murder theory" or premeditated murder because both theories were submitted to the jury, the trial judge must then make the Enmund findings himself. Id. at 199, 665 P.2d at 81.

In my view, developments since Enmund and McDaniel -- particularly Tison with its standard of reckless indifference -- and our experience with the McDaniel procedure require a reexamination of the McDaniel procedure. In a system that values trial by jury, it seems anomalous to allow a judge to resolve the only true factual issue in the case and, in doing so, to reach a result that may be directly contrary to the jury's finding. Apparently here, the judge's finding was evidently one that the jury considered but was unable to reach.

If we continue to follow the McDaniel procedure, we may well produce decisions that conflict with the jury trial principles espoused by the United States Supreme Court in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411 (1986), and by this court in State v. Hurley, 154 Ariz. 124, 741 P.2d 257 (1987), and State v. Powers, 154 Ariz. 291, 742 P.2d 792 (1987); see also Adamson v. Ricketts, No. 84-2069, slip op. at 24-39 (9th Cir. Dec. 22, 1988) (en banc) (finding unconstitutional Arizona's death penalty statute because, inter alia, it allows the sentencing judge to find the evidence of the elements of the crime of "capital murder").

I believe that, at the very least, we must in the future consider requiring the jury to receive a separate verdict form for the premeditated murder theory in cases that have been submitted to the jury on both felony murder and premeditated murder theo-

ries. This use of separate verdict forms would give the judge in sentencing and this court in exercising its responsibility to review death penalty cases the valuable benefit of an actual jury finding, and we would also avoid many of the questions that afflict courts in reviewing death penalty cases.

STANLEY G. FELDMAN, Vice Chief Justice

MOELLER, Justice, concurring

I agree with Vice Chief Justice Feldman's suggestion that we should adopt, for future cases, the practice of submitting separate verdict forms when, in a potential death penalty case, the case is submitted to the jury on both premeditated murder and felony murder theories. In my opinion, such a change in practice would be prudent in light of developments which have occurred since the existing practice was approved in McDaniel and would, I believe, be of great assistance to trial judges and to judges of this court who are attempting to resolve the increasingly complex issues presented by death penalty cases. To this extent, I join in his concurrence.

JAMES MOELLER, Justice

HLH:mpc
5/19/89

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TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300
HAROLD L. HIGGINS #25700
ATTORNEY FOR DEFENDANT

IN THE SUPREME COURT OF THE STATE OF ARIZONA

THE STATE OF ARIZONA, Appellee, vs. JEFFREY ALAN WALTON, Appellant.	No. CR-87-0022-AP (Pima County Superior Court No. CR-17537) MOTION FOR RECONSIDERATION

Appellant files this motion for reconsideration of the decision filed February 2, 1989, and for the reasons set forth herein, respectfully urges this Court to reverse said decision.

I.

Adamson v. Ricketts controls this Decision and Mandates Reversal.

Adamson v. Ricketts, _____ F.2d _____ (No. 84-2069, 9th Cir., filed December 22, 1988), mandates reversal of the death penalty rendered herein. The Ninth Circuit Court of Appeals found the Arizona death penalty to be unconstitutional for several reasons: 1. the findings of aggravating circumstance ought to be made by a jury;

#38

Appendix "B"

PIMA COUNTY PUBLIC DEFENDER
32 N. STONE AVENUE, FOURTH FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300

2. the aggravating factor of "especially heinous, cruel or depraved" is impermissibly vague; 3. the sentencing court is limited to the mitigating factors enumerated in A.R.S. 13-703; and 4. the defendant has the burden of proving mitigating circumstances, thus imposing a presumption that death is an appropriate penalty.

These factors are all present in this case. The Adamson decision mandates reversal.

II.

Decision Based on Factual Inaccuracies.

Appellant raised an issue of effectiveness of counsel. The court's analysis of this issue is based on an erroneous factual premise. Thomas Higgins, Esq., represented appellant at trial. Harold L. Higgins, Jr., appellant's current counsel, was appointed to handle the appeal and has done so at all stages. Current counsel is of no relation or association to trial counsel. This court's opinion clearly assumes, and erroneously so, that trial counsel and appellate counsel were one and the same person.

Appellant still believes that trial counsel's performance was inadequate to the extent mandating reversal. In any event, the decision should be revised to correct this inaccuracy.

. . .

#39

RESPECTFULLY SUBMITTED this _____ day of May, 1989.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

By_____
HAROLD L. HIGGINS, JR.
Attorney for Appellant

Copies of the foregoing
mailed/delivered this date to:

ATTORNEY GENERAL'S OFFICE
Assistant Paul J. McMurdie

LAW OFFICES
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TUCSON, ARIZONA 85701
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Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF COURT

1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3231

TELEPHONE (602) 542-4536

KATHLEEN S. KEMPLEY
CHIEF DEPUTY CLERK

March 22, 1989

RE: STATE OF ARIZONA vs. JEFFREY ALAN WALTON
Supreme Court No. CR-87-0022-AP
Pima County No. CR-17537

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 21, 1989, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration [Appellee State] = DENIED, with Clerk to amend the opinion to correct the same to indicate appellate counsel did not serve as trial counsel.

FURTHER ORDERED: Motion for Reconsideration [Appellant Walton] = DENIED.

Justice Corcoran, having recused himself, did not participate in the determination of this matter.

Justice Moeller was not present and did not participate in the determination of this matter.

Order Affirming the Convictions and Sentences (Mandate) enclosed.

NOEL K. DESSAINT, Clerk

TO:
Robert K. Corbin, Esq., Attorney General, 1275 W. Washington, Phoenix, AZ 85007 ATTN: Paul J. McMurdie
Harold L. Higgins, Jr., Esq., Pima County Public Defender, 32 N. Stone, 4th Floor, Tucson, AZ 85701

Appendix "C"

The crime of First Degree Murder requires proof of the following three things:

1. The defendant caused the death of another person; and

2. The defendant knew that he would cause the death of another person; and

3. The defendant acted with premeditation.

"Premeditation" means:

1. That a person either intends or knows that his conduct will result in death to another person; and

2. His intent or knowledge exists before the killing long enough to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. But no appreciable length of time must elapse between the formation of the intent to kill and the act; they may be as instantaneous as successive thoughts of the mind.

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MAY 18 '89 15:28 ELECTRON INSTANT MAIL 6023811798 P.6

303

MAY 18 '89 15:28 ELECTRON INSTANT MAIL 6023811798 P.6

Appendix "D"

ARIZONA SUPERIOR COURT, PIMA COUNTY

STATE V JEFFREY ALAN WALTON Defendant	NO. CR-17537 VERDICT HON. THOMAS MEEHAN	FILED IN COU Dec 16 19 JAMES N. CO[illegible]RT, Cle T Clune De 3:25pm

We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty of FIRST DEGREE MURDER as alleged in Count One of the Indictment.

384

Larry Ramsey Inman
Foreman

SCCR-19(05/82)

Appendix "E"

332

PROCEEDINGS

JANUARY 26, 1987

SENTENCING

THE COURT: State of Arizona versus Jeffrey Walton, CR-17537. Tom Higgins for the defendant. Ken Peasley for the State.

MR. PEASLEY: Kate Dawes will also be present.

THE COURT: Now is the time set for an aggravation/mitigation hearing. Is the State ready?

MR. PEASLEY: I wanted -- your witness won't be here until 8:30?

MR. HIGGINS: Yes.

THE COURT: Let's proceed with the aggravation hearing.

MR. PEASLEY: I would call Dr. Jones.

MR. HIGGINS: I have just a preliminary argument before Dr. Jones testifies.

THE COURT: Go ahead.

MR. HIGGINS: I interviewed Dr. Jones in preparation for trial. But I believe he's going to testify to matters that are outside the aggravating circumstances under 13-703, et cetera. Those matters being the length of time that the victim was alive

Appendix "F"

subpoenaed down here who is a jury member and we had something to take up with the Court on that. But besides that, nothing else.

THE COURT: And you only have the one witness?

MR. HIGGINS: Meaning Dr. Gurland? I may have one other one. We are going to reach a stipulation on Dr. Munoz and we may have Mike Addis as a witness but I haven't talked to him completely. So probably just Dr. Gurland. That's correct.

THE COURT: All right, what's next?

MR. HIGGINS: I have Larry Inman who was the foreman of the jury outside, if you want to argue that we can do that. And I would like to call him if I can.

MR. PEASLEY: As I indicated to Mr. Higgins 24.1 and State versus Hall, which is 129 Arizona 589 and State versus Callahan, 119 Arizona 217, I think it's clear that jury affidavits or testimony are not admissible insofar as they concern the deliberating process of jury members. And Mr. Higgins apparently intends to elicit testimony from Mr. Inman concerning his deliberation process during the course of the jury deliberations in this case.

appropriate either by virtue of live testimony or affidavit.

MR. HIGGINS: Judge, I am going to ask him a couple of things. I know what the case law and rule 24 says. That goes to their mental processes as to assenting or dissenting from the verdict, I am not going into that, I'm going to ask questions in those two areas briefly, that being whether the jury utilized the felony murder or premeditated murder which were both submitted to them over my objection in their deliberations, he will tell you the felony murder.

And then I would ask him if they considered, if the jury considered premeditated murder and he will answer yes, but never could decide on who pulled the trigger.

The reason that's important is because since the Enmund case, a Supreme Court case, and MacDaniels followed it in our Supreme Court, they found if the felony murder rule was used, Your Honor, because we don't have a jury decision on this, Your Honor has to decide whether the defendant killed, attempted to kill or intended to kill and that goes to the weight of that. The jury could not reach that decision and that's the arbiter of that fact.

will not go into things that go into the verdict, under the case law they can proceed under either or both. But I am going to ask which one and why. And that's all. I'm not going into the other things. And there are other things that arguably would affect the verdict and I am not going to question about that. That way I think there's not an invasion of the juror's province and it is a factual determination.

MR. PEASLEY: I don't know how much more you can inquire into the deliberation process than to be asking upon what the jury based its verdict. He's down here pursuant to a subpoena, he had to answer the subpoena; and to put a juror on the witness stand under subpoena and start making inquiries about the deliberating process I think is entirely improper under the rules. I would oppose the request, I frankly disagree from my understanding with some of the things Mr. Higgins says but I don't want to start bantering about a jury decision because I think it's improper, I would move to preclude this testimony.

THE COURT: Show the motion to preclude the juror's testimony is granted. And Tom, I will accept that as an offer of proof for purposes of the record.

MR. HIGGINS: Okay, hat is what I was going to ask.

THE COURT: Okay. Is there anything else right now?

MR. HIGGINS: Not right now.

MR. PEASLEY: Not right now.

THE COURT: Continue this hearing until 8:30 tomorrow morning.

((Whereupon the Court stands adjourned in this matter for the day.))

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottrell Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

[ ] ORDERED exonerating any bond.

[ ] ORDERED granting the State's Motion to Dismiss _____

ORDERED authorizing the Sheriff of Pima County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

FILED: Notice of Rights of Appeal, signed by the Defendant.

[X] ISSUED: Order of Confinement

10:00 a.m./p.m. Hearing concludes.

JUDGE OF THE SUPERIOR COURT

cc: County Attorney (3)
Thomas Higgins, Esq.
Harold Higgins, Esq.
Department of Corrections - 3 certified
Arizona Supreme Court, Phoenix, AZ
Sheriff - 3 certified
Adult Probation - 1 certified
Appeals
Hon. John G. Hawkins
Hon. Thomas Meehan

[ ]

BOOK 2900 PAGE 387

Page 9

MINUTE ENTRY FREY ALAN WALTON

Page No. 8 Date Janaury 27, 1987 Case No. CR-17537

IT IS ORDERED that Thomas Higgins be withdrawn as attorney of record.

IT IS FURTHER ORDERED Harold Higgins be appointed to represent defendant on appeal.

453

BOOK 2900 PAGE 386 Sharon Cottrell

Appendix "G"

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Four, THEFT BY CONTROL OVER $1,000.00

FELONY CLASS: 3

IN VIOLATION OF A.R.S. SECTIONS: 13-1802(A)(1) and (C); 13-604

DATE OF OFFENSE: 3/2/86

SENTENCE: ten (10) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED
[X] NONDANGEROUS [ ] DANGEROUS PURSUANT TO A.R.S. 13-604
[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604
[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. a Class _____ felony, nondangerous/dangerous, convicted in _____

2. a Class _____ felony, nondangerous/dangerous, convicted in _____

[X] This sentence is to be concurrent with Counts Two and Three

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.
This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Three, KIDNAPPING

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1304(A)(3) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED
[ ] NONDANGEROUS [X] DANGEROUS PURSUANT TO A.R.S. 13-604
[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604
[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. a Class _____ felony, nondangerous/dangerous, convicted in _____

2. a Class _____ felony, nondangerous/dangerous, convicted in _____

[X] This sentence is to be concurrent with Count Two

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.
This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

XVI Division | January 27, 1987 Date | THC S MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Two, ARMED ROBBERY

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1902; 13-1904(A)(1) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED

[ ] NONDANGEROUS [X] DANGEROUS PURSUANT TO A.R.S. 13-604

[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604

[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. _____

a Class _____ felony, nondangerous/dangerous, convicted in _____

2. _____

a Class _____ felony, nondangerous/dangerous, convicted in _____

[ ] This sentence is to be concurrent with _____

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record. 403

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

January 27, 1987 Case No. CR-17537

As to counts Two, Three and Four,

THE COURT FINDS the same aggravating circumstances. In addition thereto,

THE COURT FINDS the following aggravating circumstances:

Prior felony conviction; traumatic anxiety and loss caused to the victim's family; defendant's failure to benefit from prior rehabilitative efforts in his behalf.

THE COURT FINDS a significant danger to the community, therefor

405

BOOK 2000 PAGE 382

MAY 19 '89 15:30 ELECTRON INSTANT MAIL 6023811798 P.13

Div January 27, 1987 Date TH AS MEEHAN Judge o. ommissioner Sharon Cox Deputy

No. CR-1753.

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count One, FIRST DEGREE MURDER

FELONY CLASS: 1

IN VIOLATION OF A.R.S. SECTIONS: 13-1105; 13-703; 13-710

DATE OF OFFENSE: 3/2/86

SENTENCE: IT IS THE SENTENCE OF THE COURT that defendant be committed the Arizona State Department of Corrections and there to be put to death in the manner prescribed by law.

( ) MITIGATED ( ) PRESUMPTIVE ( ) AGGRAVATED

( ) NONDANGEROUS (X) DANGEROUS PURSUANT TO A.R.S. 13-604

(X) NONREPETITIVE ( ) REPETITIVE PURSUANT TO A.R.S. 13-604

( ) NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) ( ) DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. _____
a Class _____ felony, nondangerous/dangerous, convicted in _____

2. _____
a Class _____ felony, nondangerous/dangerous, convicted in _____

( ) This sentence is to be concurrent with _____

( ) This sentence is to be consecutive with _____

and the reasons therefore are stated by the Court on the record.

This sentence is to date from January 27, 1987 The Defendant is to be given credit for 123 days served prior to sentencing.

(Continued) BOOK 2900 PAGE 384

XVI Div January 27, 1987 Date THOMAS MEEHAN Judge or Commissioner Sharon Cottr Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated on the following page. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

As to Count One, FIRST DEGREE MURDER.
THE COURT FINDS beyond a reasonable doubt that the defendant caused the victim's death.
The court has considered the following mitigating circumstances:
1) Competency to appreciate the wrongfulness of his conduct or to conform his conduct as to the requirements of law was impaired but not so impaired to prevent a prosecution.
2) The court also considered all other mitigating factors as set forth in the presentence report and as presented by his attorney this date.
THE COURT FINDS the following aggravating circumstances:
1) That the defendant committed the offense in an especially heinous, cruel or depraved manner.
2) That the offense was committed for pecuniary gain.
THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency, therefore,

483

BOOK 2900 PAGE 380

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January 27, 1987
JAMES N. CORBETT, Clerk
X. Cottrell Deputy

SUPERIOR COURT OF ARIZONA
PIMA COUNTY
TUCSON, AZ

[James N. Corbett]

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottrell Deputy

NO. CR-17537

STATE OF ARIZONA
VS
JEFFREY ALAN WALTON

County Attorney
By: Kenneth Peasley and Kate D.

Thomas Higgins
Defense Counsel

DATE OF BIRTH: 1/29/66

SENTENCE OF IMPRISONMENT

8:30 a.m./~~p.m.~~. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

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Court Reporter Deirdre Muzall is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant ~~knowingly, intelligently, and voluntarily waived his right~~ to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

492

[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

(Continued)

DATE 10/25/87

NOV 18 '89 15:29 ELECTRON_INSTANT MAIL 6023811798